

STATE OF MICHIGAN
COURT OF APPEALS

SALVATORE BADALAMENTI,

Plaintiff-Appellant,

v

SHELDON L. MILLER & ASSOCIATES, P.C.,
f/k/a LOPATIN, MILLER & DOMOL, P.C., f/k/a
LOPATIN & MILLER, P.C.,

Defendant-Appellee.

UNPUBLISHED
November 17, 2005

No. 254790
Oakland Circuit Court
LC No. 2003-048460-NM

Before: Gage, P.J., and Hoekstra, and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant summary disposition under MCR 2.116(C)(10). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

After sustaining complications while being treated for a heart attack, plaintiff hired defendant law firm to pursue a medical malpractice action against his hospital and cardiologist. Defendant retained a medical expert and filed suit on plaintiff's behalf, alleging that the hospital and cardiologist had been negligent in diagnosing and treating plaintiff's cardiogenic shock. The suit proceeded to trial, and plaintiff was awarded a \$15 million jury verdict. On appeal, this Court concluded that the expert testimony had been insufficient to establish cardiogenic shock. Because cardiogenic shock had been the only theory pleaded, the jury verdict was reversed and judgment was entered in favor of the hospital and cardiologist. *Badalamenti v William Beaumont Hosp*, 237 Mich App 278; 602 NW2d 854 (1999).

Plaintiff then brought this legal malpractice action against defendant law firm, asserting that defendant owed a duty to plead alternate theories of causation in the underlying medical malpractice action. Plaintiff claimed that the jury verdict would not have been reversed if defendant had amended the complaint to assert additional theories. Defendant moved for summary disposition, claiming that its decision to plead only cardiogenic shock had been a professional judgment, and therefore did not fall below the standard of care.

This Court reviews an order granting summary disposition de novo. *Taxpayers of Michigan Against Casinos v Michigan*, 471 Mich 306, 317; 685 NW2d 221 (2004). Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue of material fact

and the moving party is entitled to judgment as a matter of law. *West v General Motors Corp*, 469 Mich 117, 183; 665 NW2d 468 (2003). Once a defendant has offered evidence in support of its motion for summary disposition, the plaintiff has a duty to rebut the defendant's contention with evidence of its own. *Quinto v Cross & Peters Co*, 451 Mich 358, 371; 547 NW2d 314 (1996).

In *Mitchell v Dougherty*, 249 Mich App 668; 644 NW2d 391 (2002), this Court applied the attorney judgment rule of *Simko v Blake*, 448 Mich 648; 532 NW2d 842 (1995):

An attorney has an implied duty to exercise reasonable skill, care, discretion, and judgment in representing a client. Further, an attorney is obligated to act as an attorney of ordinary learning, judgment, or skill would under the same or similar circumstances. . . . “[W]here an attorney acts in good faith and in honest belief that his acts and omissions are well founded in law and are in the best interest of [the] client, [the attorney] is not answerable for mere errors in judgment.” [*Mitchell, supra* at 677 (citations omitted).]

Defendant, in its motion for summary disposition, asserted that its pleading decision in the underlying action had been made in good faith, and amounted at most to a mere error in judgment. In response, plaintiff provided an affidavit stating that defendant had generally breached its duty to plaintiff, but failed to identify how defendant's actions were inconsistent with the attorney judgment rule of *Mitchell, supra*.

After reviewing the documentary evidence, we conclude that plaintiff failed to overcome the attorney judgment rule in its case against defendant. In order to avoid summary disposition, plaintiff had the burden of rebutting defendant's evidence with at least some evidence of its own. However, plaintiff presented no evidence that defendant's pleading and theory in the underlying case were motivated by anything other than a good faith belief. Because plaintiff presented no evidence that defendant's actions had not resulted from a mere error in judgment, there was no genuine issue of material fact regarding defendant's alleged negligence. Therefore, the trial court properly granted defendant's motion for summary disposition under MCR 2.116(C)(10).

Affirmed.

/s/ Hilda R. Gage
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray